



financial supervisory authorities
 and
 financial services
 COME TOGETHER

International conference GCEFCL
 Towards Sustainable Financial Services in the EU:
 Making Sense of the Trend
 Amsterdam, September 30th, 2016



Topic

- Ensuring compliance with EU and Dutch principles based-regulation:
 - The role of financial supervisory authorities
- The key problem
 - Distance / conflict between authorities and services
- How to bridge / solve?
 - Communication and soft law



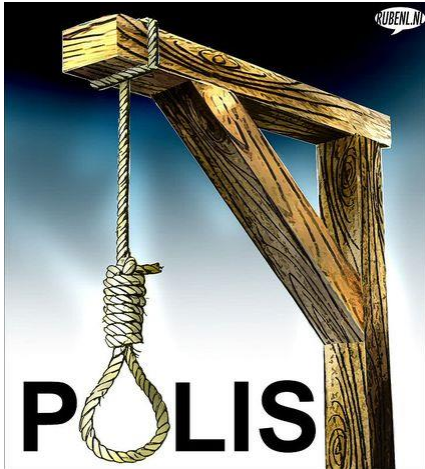
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Conflict





Confidence Problem



- Trust: easy to loose, hard to regain
 - Decade? Generation?
- Necessity of severe supervision
 - Permanently
- Tackle illegal *and* legal but harmful conduct
 - Malcolm Sparrow



Principles-based

- Open norms
- Duty of care for the addressees
- Compliance
 - Primary responsibility for the addressees
- Enforcement
 - Reactive position authorities
- Lack of legal certainty for the addressees?
- Risk for arbitrariness?
- Risk for function creep?



Structure of powers legal enforcement

*When a person breaches the norm (X),
 the administration can (Y1) impose a sanction (Y2).*

Is the norm violated? X

If so: Should a sanction be imposed? Y1

If so: Which one? Y2



Discretion (Y1, Y2)?

	Y1	Y2
Remedial sanction	duty to enforce	deference
Punitive sanction	deference	full jurisdiction



The X-thing

When a person breaks a norm, (X)

- In case of open norms
- Deference or Full Jurisdiction?

When a bank does not comply to demands of integrity, ...

When its prospectus does not comply to demands of transparency, ...

The organization takes care of the compliance of its accountants...



The X-thing

Traditional Approach

- Traditional doctrine
 - Nulla poena sine lege certa (Bestimmtheitsgebot)
 - No deference
- Discretion: yes-no, static phenomenon



The X-thing

Modern Approach

- Foreseeability (increases gradually)
- Duty to
 - Inquire (addressees)
 - Inform (authorities)
 - Order; declaration (Feststellungsklage)
- Relevance of to whom the norm is addressed to
- Discretion: gliding scale, dynamic phenomenon



Conflict and Distance Street Cats





Private and Public Soft Law

- Open norm
- Primary responsibility addressees
 - Self-regulation
- Reactive position authorities
 - Comply or
 - Explain and establish policy rules
- No self-regulation, and specific norms are required
 - Establish policy rules



Individual norm-making

- Soft law: general information and communication
- Individual *binding* designation
 - 4:24a Wft
 - Exclusive basis for a sanction
- Individual *non-binding* information
 - Quasi-declaration:
 - No basis for a judicial remedy



Consequences

- Duty for financial supervisory authorities
 - To give its opinion about self-regulation of (organizations of) financial services
 - To publish administrative rules, guidelines, etc, in case of rejection or absence of this self-regulation
 - To give specific information when demanded
- Regarding
 - The X-thing
 - Y1 (Y2)



COME TOGETHER

bridging the distance between
 financial supervisory authorities and financial services

Co-operation
Communication
Transparency



financial supervisory authorities and financial services

A Hug?!

